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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

Sac and Fox Nation of Missouri, Iowa Tribe of Kansas and Nebraska, Kickapoo Tribe of Indians of the Kickapoo Reservation, *Petitioners*

v.

Karla Pierce, Secretary, Kansas Department of Revenue, *Respondent*

On Petition For A Writ Of Certiorari
to the United States Court of Appeals for the Tenth Circuit

APPENDIX, VOL. II FOR A WRIT OF CERTIORARI

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Article V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUES:

AN ACT FOR THE ADMISSION OF KANSAS INTO THE UNION, Act of Jan. 29, 1861, ch. 59, s. 1, 12 Stat. 126.

Section 1. Admission; boundaries; Indian title. That the state of Kansas shall be, and is hereby declared to be, one of the United States of America, and admitted into the union on an equal footing with the original states in all respects whatever. And the said state shall consist of all the territory included within the boundaries, to wit: Beginning at the point on the western boundary of the state of Missouri, where the thirty-seventh parallel of north latitude crosses the same; thence west on said parallel to the twenty-fifth meridian of longitude west from Washington; thence north on said meridian to the fortieth parallel of latitude; thence east on said parallel to the

western boundary of the state of Missouri; thence south with the western boundary of said state to the place of beginning: *Provided:* That nothing contained in the said constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the state of Kansas, until said tribe shall signify their assent to the president of the United States to be included within said state, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never passed.

AN ACT TO ORGANIZE THE TERRITORY OF KANSAS, Act of May 30, 1854, ch. 59, s.19, 10 Stat. 284.

Section 19. Creation of territorial government. That all that part of the territory of the United States included within the following limits, except such portions thereof as are hereinafter expressly exempted from the operations of this act, to wit, beginning at a point on the western boundary of the state of Missouri, where the thirty-seventh parallel of north latitude crosses the same; thence west on said parallel to the eastern boundary of New Mexico; thence north on said boundary to latitude thirty-eight; thence following said

boundary westward to the east boundary of the territory of Utah, on the summit of the Rocky Mountains; thence northward on said summit to the fortieth parallel of latitude; thence east on said parallel to the western boundary of the state of Missouri; thence south with the western boundary of said state to the place of beginning, be, and the same is hereby, created into a temporary government by the name of the territory of Kansas; and when admitted as a state or states, the said territory, or any portion of the same shall be received into the union with or without slavery, as their constitution may prescribe at the time of their admission: *Provided further:* That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with an Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Kansas, until said tribe shall signify their assent to the president of the United States to be included within the said territory of Kansas, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed.

THE KANSAS ACT, 18 U.S.C. 3243

Jurisdiction is conferred on the State of Kansas over offenses

committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

KANSAS STATUTE ANNOTATATED 79-3408

79-3408. Tax imposed on use, sale or delivery of motor-vehicle fuels or special fuels; pumps lab
(a) A tax per gallon or fraction thereof, at the rate computed as prescribed in K.S.A. 79-34,141, and amendments thereto, is hereby imposed on the use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in this state for any purpose whatsoever.
(b) Every retail pump for motor-vehicle fuels shall be conspicuously labeled to show the content and percentage of any ethyl alcohol or other alcohol combined or alone in excess of 1% by volume.
(c) Unless otherwise specified in K.S.A. 79-3408c, and amendments thereto, the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once. Such tax shall be computed on all motor-vehicle fuels or special fuels received by each distributor, manufacturer or importer in this state and paid in the manner provided for herein, except that an allowance of 2.5% shall be made and deducted by the distributor to cover all ordinary losses which may have resulted from physical loss while handling such motor-vehicle fuels or special fuels. No such allowance shall be made on any motor-vehicle fuel or special fuel exported from the state or sold to the United

States of America or any of its agencies or instrumentalities as are now or hereinafter exempt by law from liability to state taxation. No such allowance shall be made for any motor-vehicle fuel or special fuel sold or disposed of to a consumer in tank car, transport or pipeline lots.

(d) No tax is hereby imposed upon or with respect to the following transactions:

(1) The sale or delivery of motor-vehicle fuel or special fuel for export from the state of Kansas to any other state or territory or to any foreign country.

(2) The sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation.

(3) The sale or delivery of motor-vehicle fuel or special fuel to a contractor for use in performing work for the United States or those agencies of the United States above mentioned, provided such contractor has in effect with the United States or any such agency a cost-plus-a-fixed-fee contract covering the work.

(4) The sale or delivery of motor-vehicle fuel or special fuel which is aviation fuel.

(5) The first sale or delivery of motor-vehicle fuel or special fuel from a refinery, pipeline terminal, pipeline tank farm or other place to a duly licensed distributor who in turn resells to another duly licensed distributor.

(6) The sale or delivery of special fuel which is indelibly dyed in accordance with regulations prescribed pursuant to 26 U.S.C. 4082 and such special fuel is only used for nonhighway purposes.

(e) Each distributor, manufacturer, importer, exporter or retailer shall make full reports and furnish such further information as the director may require with reference to all

transactions upon which no tax is to be paid.

TREATIES:

TREATY WITH THE KICKAPOO, Oct. 24, 1832, art. 2, 7 Stat. 391.

ARTICLE II. The United States will provide for the Kickapoo tribe, a country to reside in, southwest of the Missouri river, as their permanent place of residence as long as they remain a tribe. And whereas, the said Kickapoo tribe are now willing to remove on the following conditions, from the country ceded on Osage river, in the State of Missouri, to the country selected on the Missouri river, north of lands whcih have been assigned to the Delawares; it is hereby agreed that the country within the following boundaries shall be assigned, conveyed, and secured by the United States to the said Kickapoo tribe, as their permanent residence, viz: Beginning on the Delaware line, six miles westwardly of Fort Leavenworth, thence with the Delaware line westwardly sixty miles, thence north twenty miles, thence in a direct line to the west bank of the Missouri, at a point twenty-six miles north of Fort Leavenworth, thence down the west bank of the Missouri river, to a point six miles nearly northwest of Fort Leavenworth, and thence to the beginning.

TREATY WITH THE KICKAPOO, May 18, 1854, art. 1, 10 Stat. 1078.

ARTICLE 1. The Kickapoo tribe of Indians hereby cede, sell,

and convey unto the United States all that country southwest of the Missouri River, which was provided as a permanent home, for them in the treaty of Castor Hill, of the twenty-fourth of October, one thousand eight hundred and thirty-two, and described in the supplemental article thereto, entered into at Fort Leavenworth, on the 26th of November, one thousand eight hundred and thirty-two, as follows: Beginning "on the Delaware line, where said line crosses the left branch of Salt Creek, thence down said creek to the Missouri River, thence up the Missouri River thirty miles when measured on a straight line, thence westwardly to a point twenty miles from the Delaware line, so as to include in the lands assigned to the Kickapoos, at least twelve hundred square miles;" saving and reserving, in the western part thereof, one hundred and fifty thousand acres for a future and permanent home, which shall be set off for, and assigned to, them by metes and bounds. *Provided,* That upon the return home of the delegates here contracting, and upon consultation with their people, and after an exploration if required by them, in company with their agent, a location to that extent can be found within said specified section of country suited to their wants and wishes. *And it is further provided,* That should a suitable location, upon examination and consultation, to the full extent of one hundred and fifty thousand acres, not be found within said western part of this cession, then the said delegates and agents shall be permitted to extend the location beyond the western line of the country herein ceded and north of the recent Delaware line over so much of the public domain, otherwise unappropriated, as shall make up the deficiency - or to make a selection entirely beyond the limits of the country at present occupied by the Kickapoos upon any lands of the United States, not otherwise appropriated, lying within the limits of

the country at present occupied by the Kickapoos upon any lands of the United States, not otherwise appropriated, lying within the limits bounded by the said western line, by the recent Delaware northern line, and the waters of the Great Nemahaw River; and in either case they shall describe their selection, which must be made within six months from date hereof, by metes and bounds, and transmit the description thereof, signed by the said delegates and agent, to the Commissioner of Indian Affairs; and thereupon, the selection so made, shall be taken and deemed as the future permanent home of the Kickapoos shall claim under this article no more than one hundred and fifty thousand acres of land; and if that quantity or any portion thereof shall be selected, as provided above, outside of the reservation herein made, then said reservation, or a quantity equal to that which may be selected outside thereof, shall be, and the same is hereby, ceded and relinquished to the United States.

TREATY WITH THE IOWA, Sept. 17, 1836, art. 2, 7 Stat. 511.

ARTICLE 2. As the said tribes of Ioways and Sacks and Foxes, have applied for a small piece of land, south of Missouri, for a permanent home, on which they can settle, and request the assistance of the Government of the United States to place them on this land, in a situation at least equal to that they now enjoy on the land ceded to them: Therefore I, William Clark, Superintendent of Indian Affairs, do further agree on behalf of the United States, to assign to the Ioway tribe, and Missouri band of Sacks and Foxes, the small strip of land on the south side of the Missouri river, lying between the

Kickapoo northern boundary line and the Grand Nemahar river, and extending from the Missouri back and westerly with the said Kickapoo line and the Grand Nemahar, making four hundred sections; to be divided between the said Ioways and Missouri band of Sacks and Foxes, the lower half to the Sack and Foxes, and the upper half to the Ioways.

TREATY WITH THE IOWA, May 17, 1854, art. 1, 10 Stat. 1069.

ARTICLE 1. The Ioway tribe of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the country, with the exception hereinafter named, which was assigned to them by the treaty concluded with their tribe and the Missouri bands of Sacs and Foxes, by William Clark, superintendent of Indian affairs, on the seventeenth of September, one thousand eight hundred and thirty-six, being the upper half of the tract described in the second article thereof, as "the small strip of land on the south side of the Missouri River, lying between the Kickapoo northern boundary-line and the Grand Nemahaw River, and extending from the Missouri back and westerly with the said Kickapoo line and the Grand Nemahaw, making four hundred sections; to be divided between the said Ioways and Missouri band of Sac and Foxes; the lower half to the Sacs and Foxes, the upper half to the Ioways," but they except and reserve of said country, so much thereof as is embraced within and designated by the following metes and bounds, viz: Beginning at the mouth of the Great Nemahaw River where it empties into the Missouri; thence down the Missouri River to the mouth of Noland's Creek; thence due south one mile; thence due west to the south fork of the Nemahaw River; thence

down the said fork with its meanders to the Great Nemahaw River, and thence with the meanders of said river to the place of beginning, which country, it is hereby agreed, shall be the future and permanent home of the Ioway Indians.

TREATY WITH THE SACS AND FOXES OF MISSOURI, May 18, 1854, art. 1, 10 Stat. 1074.

ARTICLE 1. The Sacs and Foxes of Missouri hereby cede, relinquish and convey to the United States all their rights, title and interest in and to the country assigned to them by the treaty concluded on the seventeenth day of September, one thousand eight hundred and thirty-six, between William Clark, superintendent of Indian affairs, on the part of the United States, and the Ioways and Missouri Sacs and Foxes, being the lower half of the country described in the second article thereof as "the small strip of land on the south side of the Missouri River, lying between the Kickapoo northern boundary-line and the Grand Nemahaw River, and extending from the Missouri back and westwardly with the said Kickapoo line and the Grand Nemahaw, making four hundred sections; to be divided between the said Ioways and Missouri band of Sacs and Foxes; the lower half of the Sacs and Foxes, the upper half to the Ioways;" saving and reserving fifty sections, of six hundred and forty acres each, which shall be selected in the western part of the cession by the delegates, parties hereto, and the agent for the tribe, after their return home, and which shall be located in one body and set off by metes and bounds: *Provided,* That the delegates and agent can find such an amount of land in one body within said specified section of country suitable to the wants and wishes of the

Indians. *And it is further provided,* That should a suitable location, upon examination, to the full extent of fifty sections not be found within said western part of this cession, then the said delegates and agent shall be permitted to extend the location west or northwest of the country herein ceded and south of the Great Nemahaw River, over so much of the public domain, otherwise unappropriated, as shall make up the deficiency; or to make a selection entirely beyond the limits of the country herein ceded upon any lands of the United States, not otherwise appropriated, lying as aforesaid west or northwest of the ceded country and south of the Great Nemahaw. And in either case they shall describe their selection, which must be made within six months from the date hereof, by metes and bounds, and transmit the description thereof signed by said delegates and agent, to the Commissioner of Indian Affairs; and thereupon the selection so made, shall be taken and deemed as the future permanent home of the Sac and Foxes of Missouri. It is expressly understood that these Indians shall claim under this article, no more than fifty sections of land, and if that quantity or any portion thereof shall be selected outside thereof, shall be and the same is hereby, ceded, relinquished, and conveyed to the United States.

UNPUBLISHED CASES:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PRAIRIE BAND OF POTAWATOMI
INDIANS, et al.,

Plaintiffs,

VS. Civil No. 78-4197-RDR

RAYMOND JACKMAN, et al.,
Defendants.

ORDER NUNC PRO TUNC

Plaintiffs appear through one of their attorneys of record, Lance W. Burr; Defendants appear through their attorney of record, J. Richard Lake. And the Court, after being well and duly advised in the premise, finds:

1. That paragraph 13 of the Court's original findings of fact and conclusions of law reads as follows: "In order to qualify for immunity from personal property taxation, an Indian shall be domiciled within the Reservation boundaries and the personal property shall be principally located within the boundaries of the Reservation. Personal property which is located principally within the boundaries of the Reservation and which is owned by a resident Indian in joint -tenancy with some other person, or as a tenant in common with some other person, shall be immune from ad valorem taxation;".

2. That following the words "Reservation boundaries" in the third line of paragraph 13 the words "or upon any real property not within Reservation boundaries that is held in trust by the United States belonging to any Indian or Indian tribe" should be inserted; and that following the words "principally located within the boundaries of the Reservation" in line 4 of paragraph 13 the words "or upon any real property not within

Reservation boundaries that is held in trust by the United States belonging to any Indian or Indian tribe." should be inserted; and that the following words should be inserted after "boundaries of the Reservation" found at line 6 of paragraph 13, "or upon any real property not within Reservation boundaries that is held in trust by the United States belonging to any Indian or Indian tribe."

3. That paragraph 13 is hereby modified by this Order Nunc Pro Tunc to read as follows: "In order to qualify for immunity from personal property taxation, an Indian shall be domiciled within the Reservation boundaries or upon any real property not within Reservation boundaries that is held in trust by the United States belonging to any Indian or Indian Tribe and the personal property shall be principally located within the boundaries of the Reservation or upon any real property not within Reservation boundaries that is held in trust by the United States belonging to any Indian or any Indian tribe. Personal property which is located principally within the boundaries of the Reservation or upon any real property not within Reservation boundaries that isheldin trust by the United States belonging to any Indian or any Indian tribe and which is owned by a resident Indian in joint tenancy with some other person, or as a tenant in common with someother person, shall be immune from ad valorem taxation;"

IT IS SO ORDERED.

Judge

SUBMITTED AND APPROVED:
U S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE KICKAPOO TRIBE IN KANSAS, et al.,
Plaintiff,

VS. Case No. 99-4059-SAC

LAMAR SHOEMAKER, individually and in
his official capacity as SHERIFF OF
BROWN COUNTY, KANSAS,
Defendants.

DECLATORY JUDGMENT AND PERMANENT INJUNCTION

This matter comes before the Court on this 9th day of February, 2000, on plaintiff's petition for declaratory judgment and permanent injunction. Plaintiff appears by its counsel, Charley Laman. Defendant, Lamar Shoemaker, appears by his counsel, J. Steven Pigg.

The Court has previously, following a hearing on April 26, 1999, entered a Temporary Restraining Order (TRO) enjoining the defendant from serving process on lands federally recognized as the Reservation of the Kickapoo Tribe. That TRO has been continued by agreement of the parties until the present date. The parties have submitted proffers of evidence and have requested the Court to consolidate the preliminary and permanent injunction hearings and to base the Court's decision upon the evidence presented at the hearing on the Temporary Restraining Order and the written proffers of

evidence filed by the parties.

After reviewing the evidence submitted at the TRO hearing and the proffers of evidence and applicable case law, the Court enters the following findings of fact and conclusions of law.

1. The Court has jurisdiction over the parties and the subject matter of this action pursuant to 28 U.S.C. § 1331 and 1362. Venue is proper under 28 U.S.C. § 1391(b).

2. By agreement of the parties, the trial of this action on the merits is advanced and consolidated with the hearing on the application for preliminary injunction.

3. The Tribe is a federally-recognized Indian Tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* The Tribe is governed by a constitution and bylaws approved by the Secretary of the Interior pursuant to 25 U.S.C. 476. The Tribe operates a tribal judicial system and police force.

4. The Kansas Enabling Act for the Admission of Kansas into the United States, 10 Stat. 290, appears to exclude Indian land from the territorial boundaries and civil jurisdiction of the State of Kansas. The State of Kansas has not assumed civil jurisdiction over the Kickapoo's reservation nor has the Tribe consented to such jurisdiction.

5. The Tribe is the beneficial owner of certain trust lands referred to as its Reservation. The Tribe has asserted that the boundaries of the Reservation are established by the

Treaty of October 24, 1932, Art. 1, 7 Stat. 391, as amended by the Treaty of May 18, 1854, Art. 1, 20 Stat. 1078. The Sheriff has not disputed the Reservation boundaries as being established by the Treaty of June 28, 1962, which are referred to as the "federally recognized boundaries."

6. The parties do not seek a determination of the boundaries of the Reservation in this action. The execution by a deputy sheriff of a state court order of repossession of a motor vehicle which precipitated the filing of this action occurred within the "federally recognized boundaries." The parties agree that the determination of the boundaries of the Kickapoo Reservation is not an element of this action and that any disagreement about the jurisdictional boundaries is not settled by the terms of this order. Each party reserves any right it may have to establish or contest the jurisdictional boundaries of the Reservation in subsequent proceedings and *res judicata*, collateral estoppel or any other legal or equitable doctrine shall not affect the rights of the parties with respect to the boundaries of the Kickapoo Reservation. The parties also agree that this action excludes from its determination whether streets, roads and highways within the "federally recognized boundaries" are a part of the Reservation with the parties reserving their rights to resolve any dispute regarding jurisdiction over the streets, roads and highways in subsequent proceedings without the application of *res judicata*, collateral estoppel or any other legal or equitable doctrine affecting that determination.

7. The Sheriff of Brown County, Kansas, does not have jurisdiction to physically serve pre-judgment or post-judgment civil process on the Reservation within its "federally

recognized boundaries" which are outlined in the attached Exhibits A (Map) and B (Boundary Description). *See gen., Joe v. Marcum,* 621 F.2d 358 (10th Cir. 1980).

8. Serving of civil process by mail through the U.S. Postal Service in any manner permitted by the Kansas Rules of Civil Procedure is not a violation of the Kickapoo Tribe's jurisdiction.

9. The Tribe is entitled to a declaratory judgment and permanent injunction precluding the sheriff from physically serving civil process before or after civil judgment within the "federally recognized boundaries" of the Reservation described in Exhibits A and B.

10. Neither the plaintiff nor the defendant seeks recovery of attorney's fees, costs or expenses of this litigation nor does either party make a claim for damages against the other.

11. The parties have submitted this order by agreement and waive all rights of appeal.

IT IS THEREFORE DECLARED BY THE COURT that the Sheriff of Brown County does not have jurisdiction to physically serve pre-judgment or post-judgment civil process within "federally recognized boundaries" of the Reservation as described in Exhibits A and B.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant, the Sheriff of Brown County, Kansas, is permanently enjoined from physically serving civil

process within the described boundaries of the Reservation as described Exhibits A and B.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the permanent injunction entered herein does not prohibit any person or entity from filing lawful actions in the Kickapoo District Court or requesting the Tribal Court or Tribal Police to serve process and issue post-judgment remedies or conduct other proceedings pursuant to the Tribal Code or serving process by mail through the United States Postal Service.

This declaratory Judgment and Permanent Injunction was issued on this 9th day of February, 2000, supercedes the temporary restraining order, and is in full force and effect immediately.

IT IS SO ORDERED.

SAM A CROW
UNITED STATES DISTRICT
COURT SENIOR JUDGE

APPROVED BY:

CHARLEY LAMAN
ATTORNEY AT LAW
Kickapoo Legal Services
P.O. Box 109
Horton, KS 66439 (785) 486-2131
U.S.A./Indian Country

By: Charley Laman #10130
Attorney for Plaintiff

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3550 S.W. 5th Street
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Topeka, KS 66601-0949 (785) 232-7761

By: J. Steven Pigg #09213
Attorney for Defendant
Lamar Shoemaker

EXHIBIT A

BEST AVAILABLE COPY

KICKAPOO TRIBE IN KANSAS

LEGAL DESCRIPTION FOR FEDERALLY RECOGNIZED KICKAPOO RESERVATION

The following is the legal description for the federally recognized boundaries of the Kickapoo Reservation in Kansas, to wit:

Commencing at the Northwest Corner of Section 2, Township 4 South, Range 15 East; thence South for a distance of six (6) miles along the Western Boundary of Sections 2, 11, 14, 23, 26, & 35, of Township 4 South, Range 15 East, to the Southwest Corner of Section 35, of Township 4 South, Range 15 East; thence East for a distance of five (5) miles along the Southern Boundary lines of Sections 35 & 36 of Township 4 South, Range 15 East, and Sections 31, 32, & 33 of Township 4 South, of Range 16 East, (*This five (5) miles East is the Southern Boundary Line of Brown County, Kansas and the Northern Boundary Line of Jackson County, Kansas.*) To the Southeast Corner of Section 33, Township 4 South, of Range 16 East; thence North for a distance of six (6) miles on the Eastern Section boundary lines of Sections 33, 28, 21, 16, 9, & 4 of Township 4 South, Range 16 East, to the Northeast Corner of Section 4, of Township 4 South of Range 16 East; thence West five (5) miles along the Northern Section Boundary lines of Sections 4, 5, & 6, of Township 4 South, Range 16 East, and Sections 1 & 2, of Township 4 south, Range 15 East to the point of beginning; ALL BEING PLATTED IN BROWN COUNTY, KANSAS.

EXHIBIT B